

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
PETITION FOR
REHEARING**

77-1319, 77-1320

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MORRIS GOLDSMITH, a/k/a "MARLOWE",

Docket No. 77-1320

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

PETITION FOR REHEARING AND SUGGESTION
FOR HEARING EN BANC

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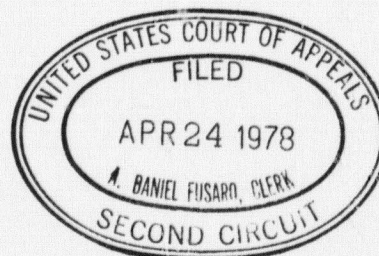


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PRELIMINARY STATEMENT

Petitioner-appellant GOLDSMITH respectfully petitions the panel of this Court which heard his appeal for a rehearing of its decision, and in the event that such rehearing is denied, respectfully suggests that the decision be considered by this Court sitting en banc.

On April 11, 1978 Judges Feinberg, Meskill and Bartells unanimously reversed the conviction of appellant NANCY REED and remanded her case to the District Court for a new trial; at the same time the Court affirmed the conviction of petitioner-appellant GOLDSMITH. (Docket Numbers 77-1319; 77-1320).

The basis for the reversal of REED's conviction was that evidence seized at the time of her arrest should have been suppressed because it resulted from an illegal arrest in that the drug enforcement agents had no warrant for her arrest. Although the Court found that there was probable cause it also found that there were no exigent circumstances justifying the

warrantless arrest. In spite of the fact that petitioner-appellant GOLDSMITH was arrested at the same time under similar circumstances, this Court declined to consider the admissibility of post-arrest statements made by him following his warrantless arrest. On the appeal is was appellant GOLDSMITH's contention that these statements should have been suppressed as the products of the illegal arrest.

The reason assigned by this Court for so declining is set forth in a footnote at page 2402 of the slip opinion wherein the Court finds that appellant GOLDSMITH waived any objection to the post-arrest statements by reason of the unlawful arrest, citing Federal Rules of Criminal Procedure 12(b)(3) and 12(f).

In reversing appellant REED's conviction this Court for the first time held that a warrantless arrest under statutory authority and with probable cause, where there are no exigent circumstances, is illegal and in violation of that person's constitutional rights. (Pages 2403-04; 2409 and note 7 of slip opinion). The Court admitted that the issue has never been decided by this Circuit or by the Supreme Court.

It is admittedly a novel limitation on the statutory authority conferred by the Comprehensive Drug Abuse Prevention and Control Act of 1970, as amended, 21 U.S.C. Section 801 et seq., and other statutes.

ARGUMENT

Petitioner-appellant respectfully suggests that the novel limitation imposed on the statute by this Court's decision in the appeal of REED should be applied to appellant GOLDSMITH's conviction for the following reasons:

1. That appellant GOLDSMITH joined REED in her objection to the warrantless arrest and did not waive this objection;

2. That even if appellant GOLDSMITH had failed to raise such objection, the interests of justice mandate a consideration of his appellate argument for the following reasons:

- (a) the error of the trial court affected a substantial right which applied equally to his conviction;
- (b) the novelty of the Court's holding justifies its overlooking technicalities of waiver and preservation;
- (c) no prejudice can result to the government from consideration of GOLDSMITH's conviction since GOLDSMITH could be retried at the same time as REED;
- (d) granted the respective degree of culpability of appellants here it would be grossly unfair to have appellant REED's conviction overturned and not that of GOLDSMITH.

POINT I:

PETITIONER-APPELANT GOLDSMITH DID NOT WAIVE
HIS OBJECTIONS TO THE WARRANTLESS ARREST.

While it is true that REED's suppression motion was directed specifically to the books seized in her apartment and introduced in evidence against her only, the record is quite clear that petitioner-appellant joined in her motion.*

The Court was at all times advised that GOLDSMITH was objecting to the receipt in evidence of his post-arrest statements as involuntary. In fact a hearing extending over 188 pages was held at the beginning of the trial at the end of which the Court ruled that the statements were voluntary because not induced by promises or threats made by the government agents. REED did not join in this suppression hearing.

During the trial it was GOLDSMITH's counsel who on cross examination of Agent Tuerack placed in the record for the first time the fact that there were no warrants for the arrest of these defendants (Tr. 398). Thereafter REED's counsel made a -----

*The arrest of GOLDSMITH took place in REED's apartment while he was sleeping in the bedroom. Although the apartment was not his the record shows that he did spend some time there; the intrusion on his privacy was just as great if not greater than it was on REED's. If the arrest as to her was illegal it would follow that it was as to him too and it may well be that the post-arrest statements which followed in quick succession while he was illegally detained would have had to be suppressed. See appellant's brief page 9.

motion for a hearing on this specific ground in which he included appellant GOLDSMITH as follows:

"MR. MARKFIELD [Reed's Counsel]. Your Honor, at this time we would want a probable cause hearing as to the basis of the arrest. There were no exigent circumstances here and he didn't have a warrant to arrest these people.

MR. MAZUR [Assistant U.S. Atty.]: I would like the Court to instruct the jury that there is no requirement of an arrest warrant.

MR. MARKFIELD: I believe under the circumstances, there would be a requirement of an arrest warrant.

THE COURT: She came to the door and they arrested her. Then they went into the apartment. Do you take the position that they had no right to go in her apartment?

MR. MARKFIELD: Not at that time, that there were no reasons why they couldn't get an arrest warrant and search warrant. They went there to search and arrest.

THE COURT: There is no evidence of any search.

MR. MARKFIELD: They took the book.

THE COURT: The book was lying in plain view. There is no objection to picking up evidence that is lying in plain view. That's quite clear.

MS. SOLLEDER [Goldsmith's Counsel]: Your Honor, the Supreme Court has said that when there are no exigent circumstances the government should proceed with an arrest warrant. Here this was five months after the last transaction. (Tr. 412-413)."

It is interesting to note that appellant GOLDSMITH's counsel specifically invoked as an argument in support of the contention that the arrest was warrantless the grounds stated by this Court--that there were no exigent circumstances justifying the arrest.

The Court in denying the motion to suppress spoke in the plural of "warrantless arrests" (Tr. 417). Appellant counsel for REED, whose competence cannot be in doubt in view of the result reached for his client, after reading the record, argued on this appeal that Judge Bryan understood precisely "what appellants were arguing here and what appellants contend on this appeal". (Appellant REED's brief, page 4).

While counsel for petitioner-appellant did not specifically assign this ground in the objections to the receipt in evidence of the post-arrest statements, the record supports a finding that she was objecting as to her client's warrantless arrest as well later on. The finality of Judge Byran's decision made further argument on this point wasteful. It is quite clear that even had he been requested to hold a hearing as to the validity of GOLDSMITH's arrest the result would have been the same and that no lengthy hearing would have been necessary or even granted by the Court. Cf. U.S. v. Chiarizzio, 525 F. 2d 289, 293 (2nd Cir., 1975).

The record here is totally unlike that found in U.S. v. Fuentes, 563 F. 2d 527 (2nd Cir., 1977) and other cases in this Circuit. There was no shifting of position on appeal by GOLDSMITH; he maintained at all times this his statements should be suppressed and the Court was well aware of his position. If the purpose of the rule is that the trial court be given an opportunity to consider and rule on the issue attempted to be raised for the first time on appeal Judge Bryan had both the opportunity and did actually consider the issue.

POINT II

- (a) UNDER THE PLAIN ERROR DOCTRINE THIS COURT SHOULD CONSIDER THE LEGALITY OF GOLDSMITH'S POST ARREST STATEMENTS.

This Court has now squarely held that a warrantless arrest, even with probable cause and under statutory authority, absent exigent circumstances, constitutes a violation of a person's 4th Amendment right. Surely this is one of those exceptional circumstances where an appellate court will notice error even absent an objection in the Court below. Founding Church of Scientology of Washington, D.C., v. United States, (C.A. 1965) 409 F. 2d 1146; cert. den. 392 U.S. 963; see also United States of America v. McAvoy, Docket No. 77-1383, 4/17/78 where this Court considered an objection to the charge in spite of the trial counsel's failure to object to the same.

(b) SINCE THE COURT'S DECISION IS THE FIRST SQUARE HOLDING ON THIS STATUTE, TECHNICALITIES OF WAIVER SHOULD NOT DEPRIVE PETITIONER-APPELLANT OF ITS BENEFIT.

Prior to this Court's decision in this case, the law was so apparently clear to the trial court and to the Assistant United States Attorney that there was little legal argument on the subject. In fact Judge Bryan made short shrift of the point by saying "I don't see what a warrantless arrest has to do with it." (Tr 417). The United States Attorney requested an instruction as a matter of law to the jury to this effect, (Tr. 412-413), stating that it was "crystal clear" that no warrant was required under the statute. Surely under the circumstances appellant GOLDSMITH's counsel should not be penalized for her failure to anticipate this Court's novel interpretation of the statute.

(c) THERE IS NO PREJUDICE TO THE GOVERNMENT FROM A REVERSAL OF GOLDSMITH'S CONVICTION AND A REMAND FOR TRIAL OR DISPOSITION TOGETHER WITH THAT OF REED'S.

(d) THE INTERESTS OF JUSTICE MANDATE EQUAL TREATMENT OF BOTH APPELLANTS.

The respective degree of culpability of the appellants is clear from the record. Appellant GOLDSMITH's brief pointed out the major role played by REED as compared to that played by him. In fact REED attempted to get rid of GOLDSMITH and go it alone. (Tr 49-51). (GOLDSMITH's brief pages 2, 4.)

In fact, the government pointed this out to the sentencing court when it filed written objections to the pre-sentence report - which pictured REED as equally or less culpable than GOLDSMITH. (See Appendix H). Under the undisputed fact it seems an unnecessarily harsh and inequitable result to reverse REED's conviction while letting that of GOLDSMITH stand on what appears to be a legal technicality.

CONCLUSION

FOR ALL THE REASONS ABOVE SET FORTH PETITIONER-APPELLANT'S PETITION SHOULD BE GRANTED BY THIS COURT AND ITS DECISION RECONSIDERED AS TO HIM; AND IN THE EVENT IT DECLINES TO DO SO CONSIDERATION OF THE DECISION SHOULD BE HAD BY THE COURT SITTING EN BANC.

Dated: April 21, 1978

Respectfully submitted,

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